

Edward D. Vaisbort, Esq. (SBN 6153)  
**MICHELMAN & ROBINSON, LLP**  
10880 Wilshire Blvd., 19<sup>th</sup> Floor  
Los Angeles, CA 90024  
Telephone: (310) 564-2670  
Facsimile: (310) 564-2671  
Attorneys for Plaintiff,  
DCR MORTGAGE 1, LLC

John P. Desmond, Esq. (SBN 5618)  
**DICKINSON WRIGHT, PLLC**  
8363 West Sunset Rd., Suite 200  
Las Vegas, NV 89113  
Attorneys for Plaintiff,  
DCR MORTGAGE 1, LLC

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DCR MORTGAGE 1, LLC, a Delaware  
Limited Liability Company,

Plaintiff,

vs.

GARY L. SYLVER, an individual, and  
DOES 1-10, inclusive,

Defendants.

Case No.: 2:16-CV-01787-GMN-NSK  
Assigned to: Hon. Gloria M. Navarro

**PLAINTIFF DCR MORTGAGE 1, LLC'S  
MOTION FOR SUMMARY JUDGMENT**

1                                    **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

2            Plaintiff DCR MORTGAGE 1, LLC ("Plaintiff") will and hereby does move the Court for  
 3 summary judgment as to the Complaint ("Complaint") filed by Plaintiff against Defendant GARY  
 4 L. SYLVER ("Defendant") pursuant to Federal Rule of Civil Procedure 56 on the grounds that the  
 5 undisputed material facts establish Plaintiff's right to summary judgment as a matter of law on the  
 6 following grounds: (1) a valid written guaranty contract existed between Defendant and Plaintiff  
 7 (as successor in interest to the original party to the contract); (2) Defendant breached the terms of  
 8 the valid contract by failing to make any payment pursuant to the contract terms; and (3) Plaintiff  
 9 has incurred damages as a result of Defendant's breach. This motion is made pursuant to Rule 56  
 10 of the Federal Rules of Civil Procedure and is supported by the attached Memorandum of Points  
 11 and Authorities, the Declarations of Jordan Zavislak and Celina C. Kirchner, Esq. with supporting  
 12 evidence, any and all papers and documents on file in this proceeding, of which the Court is  
 13 requested to take judicial notice, and upon such other and further matters as the Court may deem  
 14 appropriate.

15                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

16            **I. INTRODUCTION**

17            The simple fact is, Defendant owes Plaintiff \$1,531,823.00 pursuant to his written guaranty  
 18 of a loan that was made in 2006. Neither he, nor the company which is the principal obligor on the  
 19 loan, has made a payment on the loan since November 2007. Plaintiff, and its predecessors in  
 20 interest, modified the loan twice and entered into a forbearance agreement with Defendant in an  
 21 effort to informally and justly resolve this issue. No payments were made after *any* of these  
 22 concessions were made. Thus, this is a classic case of breach of contract: Defendant signed an  
 23 agreement, failed to perform, and has damaged Plaintiff. As a result, he must make Plaintiff whole.

24            Defendant guaranteed a loan made on October 10, 2006 to the borrower Pama Lane Holding  
 25 Company ("Pama Lane"). Defendant was the president of Pama Lane. Payments on the amount  
 26 owed under this loan abruptly stopped in December 2007. Plaintiff (through its predecessors in  
 27 interest) modified the loan twice, once in 2008 and again in 2010, to allow more time for the default  
 28 to be rectified.

1 In 2015, Pama Lane filed for bankruptcy and was liquidated, with a real property asset which  
 2 partially secured the loan being sold to repay part of the loan. After the real property was sold, a  
 3 balance of \$1,531,823.00 remained outstanding. In order to forestall collection efforts against him  
 4 for the balance, Defendant, as guarantor of the loan, entered into a forbearance agreement on the  
 5 guaranty with Plaintiff (through its predecessors in interest) whereby the obligation could be  
 6 satisfied (at a much lower balance amount) if Defendant made consistent monthly payments for three  
 7 years. Not a single payment was made.

8 Defendant breached the guaranty agreement as modified by his forbearance agreement and  
 9 remains in default on the terms of the guaranty. The undisputed facts demonstrate that both  
 10 agreements were valid, that the terms of loan obligation and the guaranty were breached, and that  
 11 Plaintiff has been damaged as a result. Accordingly, Plaintiff is entitled to judgment as a matter of  
 12 law in the sum of \$1,531,823.00 plus interest and attorney's fees against Defendant as guarantor of  
 13 the loan.

## 14 **II. UNDISPUTED MATERIAL FACTS**

15 On or around October 10, 2006, Wells Fargo Foothill, Inc. ("Wells Fargo"), through its loan  
 16 servicer, Allied Mortgage & Financial Corporation ("Allied Mortgage"), issued Pama Lane Holding  
 17 Corporation ("Pama Lane") a loan in the amount of \$3,185,000.00 (the "Loan"). (Zavislak Decl. at  
 18 Exhibits A (Servicing Agreement) and B (Note), **Exhibit 1.**) On or about November 12, 2009,  
 19 Wells Fargo transferred its interest in the Loan to DCR Mortgage IV Sub III, LLC ("DCR IV").  
 20 (Zavislak Decl. ¶ 4 and Exhibit C (Assignment), **Exhibit 1.**) The terms of the Loan were set forth in  
 21 the Commercial Balloon Promissory Note to Allied Mortgage (the "Note"). (Zavislak Decl. at  
 22 Exhibit B (Note), **Exhibit 1.**) The Loan was secured in part by the following: (a) a deed of trust lien  
 23 on two parcels located at 2020 Pama Lane, Las Vegas, Nevada, 89119 (the "Property"), (b) a  
 24 Continuing and Unconditional Guaranty by Defendant, the President of Pama Lane (the "Silver  
 25 Guaranty") and (3) a Continuing and Unconditional Guaranty by Randall Robirds, an owner of Pama  
 26 Lane. *Id.*

27 Beginning in December 2007, and every month thereafter, Pama Lane failed to make any  
 28 further payments due upon the Loan as required by the payment terms set forth in the

1 Note. (Zavislak Decl. ¶ 5 and Exhibit D (2008 Modification), **Exhibit 1.**) In order to persuade the  
2 then-obligee to refrain from exercising its remedies for the default, the borrower on June 25, 2008,  
3 sought and obtained a modification of the Loan pursuant to a Mortgage Modification Agreement (the  
4 “2008 Modification”), which established a new payment plan. (Zavislak Decl. at Exhibit D (2008  
5 Modification), **Exhibit 1.**) The principal balance on the Loan at that time of \$3,185,000.00  
6 remained unpaid. (Zavislak Decl. at Exhibit D (2008 Modification), **Exhibit 1.**) Under the terms of  
7 the 2008 Modification, the Loan was set to mature on December 17, 2008 with the balance to be  
8 paid in full on that date. (Zavislak Decl. at Exhibit D (2008 Modification), **Exhibit 1.**) Pama Lane  
9 failed to make the required payments pursuant to the terms of the 2008 Modification. (Zavislak  
10 Decl., ¶ 6., **Exhibit 1.**)

11 On June 17, 2010, the Loan was modified once again in a Memorandum of Modification of  
12 Note and Deed of Trust (the “2010 Modification”). (Zavislak Decl. ¶ 8 and Exhibit F (2010  
13 Modification), **Exhibit 1.**) The principal balance on the Loan—\$3,185,000.00—remained unpaid.  
14 (Zavislak Decl. ¶ 8 and Exhibit F (2010 Modification), **Exhibit 1.**) The maturity date of the Loan  
15 was extended to May 17, 2013. (Zavislak Decl. at Exhibit F (2010 Modification), **Exhibit 1.**)

16 When the Loan matured yet again on May 17, 2013, Pama Lane once again failed to pay the  
17 balance. (Zavislak Decl. ¶ 9 and Exhibit E (2013 Letter), **Exhibit 1.**) On June 19, 2013, DCR IV  
18 notified Pama Lane that it was again in default of the Loan. (Zavislak Decl. ¶ 9 and Exhibit E (2013  
19 Letter) p. 1, **Exhibit 1.**) At that time, Pama Lane owed DCR IV a total of \$3,188,975.08 for the  
20 outstanding principal balance of the loan, interest owed, and miscellaneous fees and costs permitted  
21 pursuant to the loan documents. (Zavislak Decl. at Exhibit E (2013 Letter), **Exhibit 1.**)

22 On October 6, 2014, Pama Lane filed for bankruptcy protection pursuant to Chapter 11 of the  
23 United States Bankruptcy Code. (Kirchner Decl., Exhibit G (Bankruptcy Docket), **Exhibit 2.**) The  
24 Loan was included as a liability of the estate, and the Property was included as an asset. (Kirchner  
25 Decl. at Exhibit H (Bankruptcy Petition) p. 12 and Exhibit I (Amended Schedules) p. 4, **Exhibit**  
26 **2.**) A Court ordered the sale of the Property on or about August 21, 2015 for a total amount of  
27 \$1,860,000, of which DCR IV received \$1,774,538.47 in partial payment of the Loan. (Kirchner  
28 Decl. ¶¶ 1-2 and Exhibit J (Court Order on Sale), **Exhibit 2.**) On September 2, 2015, DCR IV

entered into a forbearance agreement (the “Sylver Agreement”) with Defendant regarding his personal guaranty of the Loan. (Zavislak Decl. at Exhibit K (Sylver Agreement), **Exhibit 1.**) At the time that the Sylver Agreement was executed, a deficit balance of \$1,531,823.27 remained unpaid pursuant to the loan obligations and the Sylver Guaranty. (Zavislak Decl. at Exhibit K (Sylver Agreement) p. 1, **Exhibit 1.**) Pursuant to the terms of the Sylver Agreement, DCR IV agreed to forbear exercising remedies against Defendant arising from obligations made in the Note and the Sylver Guaranty in exchange for Defendant’s agreement to timely make monthly payments of \$6,084.36 for thirty-six months, commencing on the date of the Sylver Agreement. (Zavislak Decl. at Exhibit K (Sylver Agreement) § 2(c), **Exhibit 1.**) This forbearance would have resulted in a significant reduction of Defendant’s obligations pursuant to the guaranty, permitting him to pay some \$219,000 instead of the \$1.53 million he owed on the guaranty. (Zavislak Decl. at Exhibit K (Sylver Agreement) § 2(c) and p. 1, **Exhibit 1.**)

Defendant never made *any* of the monthly payments as set forth in the Sylver Agreement. (Zavislak Decl. ¶ 11, **Exhibit 1.**) To date, Defendant has not complied with any of the terms of the Note, the Sylver Guaranty or the Sylver Agreement. (Zavislak Decl. ¶¶ 11-12 and Exhibit M (2015 Letter) p. 1, **Exhibit 1.**)

On November 4, 2015, Defendant was notified that he was in default and owed a deficit balance of \$1,531,823.87 plus the fees incurred in pursuing Defendant’s compliance. (Zavislak Decl. at Exhibit M (2015 Letter) p. 2, **Exhibit 1.**) On November 30, 2015, DCR IV transferred all rights and obligations owed to it pursuant to the Note and the Guaranty, including all right in the Sylver Agreement to Plaintiff, an affiliate of DCR IV. (Zavislak Decl. ¶ 13, **Exhibit 1.**)

Plaintiff himself has confirmed that he has failed to make payments on the Loan. (Kirchner Decl. at Exhibit M (Revised Joint Case Management Report).) The deficit balance of the Sylver Agreement remains unpaid. (Kirchner Decl. at Exhibit M (Revised Joint Case Management Report) p. 2, **Exhibit 2.**)

### **III. AUTHORITY FOR SUMMARY JUDGMENT**

As the party seeking summary judgment, Plaintiff bears the initial burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.

R. Civ. P. 56(c). To enter summary judgment, the Court must examine all evidence and find no dispute concerning genuine issues of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal citations omitted).

The burden then shifts to the nonmoving party who must produce evidence sustaining a genuine issue of disputed material fact. *See id.* An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49). Accordingly, a "court need not draw all possible inferences in [the non-movant's] favor, but only all reasonable ones." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002). A fact is "material" if it may affect the outcome of the case. *Far Out Prods., Inc.*, 247 F.3d at 992. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

**IV. THE UNDISPUTED FACTS DEMONSTRATE THAT DEFENDANT FAILED TO PAY HIS LOAN UPON MATURITY; THEREFORE, HE IS IN BREACH OF A WRITTEN GUARANTY TO THE BENEFIT OF PLAINTIFF.**

A guaranty is a contract like any other; therefore a breach of guaranty is analyzed as a breach of contract. *Sawyer's Estate v. Ygnacio Med. Ctr.*, 92 Nev. 171, 173 ("[A] guarantee, if supported by sufficient consideration, is a binding contract"); *Short v. Sinai*, 50 Nev. 345, 418 (1927) (citing *McMillan v. Bull's Head Bank*, 32 Ind. 11 (1869)); *Dobron v. Bunch*, 125 Nev. 460, 464 (2009) ("[G]eneral contract interpretation principles apply to interpret guaranty agreements.") To prevail on a breach of contract claim, a plaintiff must show "(1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.*, 434 F.Supp.2d 913, 919-920 (D. Nev. 2006). Matters of contractual construction may be settled as a matter of law at summary judgment unless the contract terms are ambiguous. *Ellison v. Cal. State Auto Ass'n*, 106 Nev. 601, 603 (1990)

1           **A. The Sylver Guaranty is a Valid Contract.**

2           Contracts are “construed from the written language and enforced as written.” *Ellison*, 106  
 3 Nev. 603. So long as the language is clear on its face; the court will interpret it based on its terms.  
 4 *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 284 (2001); *see also Ellison*, 106 Nev.  
 5 603. Assignments are also considered valid contracts if they manifest the intention of the assignor to  
 6 transfer its contract right to the assignee. *Easton Bus. Opp. v. Town Exec. Suites*, 126 Nev. 119, 127  
 7 (2010).

8           The language of the 2008 Modification and the 2010 Modification is plain on the face of both  
 9 documents. In the 2008 Modification, Plaintiff as Guarantor acknowledged that “the outstanding  
 10 principal balance due under the [Loan] is Three Million One Hundred and Eighty-Five thousand and  
 11 00/100 dollars (\$3,185,000.00)” and that he was in default of the Loan “by virtue of the fact that [he]  
 12 failed to make the payment due December 2007 and each month thereafter.” (Zavislak Decl. at  
 13 Exhibit D ¶¶ 3-4, **Exhibit 1.**) Further, Plaintiff agreed to the following payment terms:

14           Mortgagor will pay Lender \$52,000 upon the execution of this Agreement but in no  
 15 event later than June 10, 2008. This payment shall be applied to the April and May  
 16 2008 mortgage payments. Lender will accept reduced payments of \$26,000 per month  
 17 from the Mortgagor commencing with the June 17, 2008 payment which will be made  
 no later than June 30, 2008. On December 17, 2008, the Note matures and Mortgagor  
 must pay off the loan in full by that date.

18 (Zavislak Decl. at Exhibit D ¶ 4, **Exhibit 1.**)

19           Thus, the 2008 Modification requires Defendant to pay the full balance of the loan by  
 20 December 17, 2008. He failed to do so. (Kirchner Decl. at Exhibit M p. 2, **Exhibit 2**; Zavislak  
 21 Decl. ¶ 14, **Exhibit 1.**) In 2010, another agreement was reached between the parties. Once again  
 22 Plaintiff reaffirmed his status as a guarantor of the Loan:

23           2.2.3. Reaffirmation of Guaranty. That the Guaranty constitutes the valid,  
 24 legally binding obligations of Guarantor, enforceable against Guarantor in  
 25 accordance with the terms thereof and remains in full force and effect; and that each  
 Guarantor consents to the execution and delivery of this Agreement.

26 (Zavislak Decl. at Exhibit F ¶ 2.2.3, **Exhibit 1.**) Pursuant to the 2010 Modification, Defendant was  
 27 entitled to payment:  
 28

2.2.2. Indebtedness. That, as of the Effective Date, the unpaid principal balance of the Note is Three Million One Hundred Eighty-Five Thousand and No/100ths Dollars (\$3,185,000.00) (the "Unpaid Principal"), with non-default interest paid current to August 16, 2008. There is outstanding on the Loan non-default and default interest in an aggregate amount of One Million Four Hundred Fifty-Six Thousand Five Hundred Fifteen and 84/100ths Dollars (\$1,456,515.84) (the "Unpaid Interest"). There is outstanding on the Loan certain other fees and default amounts due and owing by Borrower by virtue of Borrower's failure to pay all sums as and when due under the Loan Documents in an aggregate amount of One Hundred Seventy Thousand Three Hundred Ninety-Four and 75/100ths Dollars (\$170,394.75) (the "Default Amounts"). In addition to the Unpaid Principal, Unpaid Interest and Default Amounts, Lender is entitled to reimbursement in the amount of Sixty-Five Thousand Seven Hundred Twenty-One and 95/100ths Dollars (\$65,721.95) for protective advances made by Lender on behalf of Borrower as well as legal fees incurred by Lender, all pursuant to the Loan Documents (the "Protective Advances"). The Unpaid Interest and Default Amounts shall continue to accrue interest at the rate of twenty-five percent (25%) per annum, until paid in full or forgiven...

(Zavislak Decl at Exhibit F ¶ 2.2.2, **Exhibit 1**.)

Finally, Plaintiff entered into the Sylver Agreement, through which DCR IV (and Plaintiff as successor in interest) agreed to forego enforcement of its rights following Defendant's breach of the Note if he fulfilled a series of obligations, most notably, "successive monthly payments on the 1st day of each month, in the amount of \$6,084.36, for thirty-six (36) consecutive months, for a total of \$219,036.96." The language of the Sylver Agreement is unambiguous, and its terms are valid and enforceable.

**B. Defendant Breached the Sylver Guaranty by Failing to Pay Before it Became Due.**

"Failure to perform one's obligations within the express terms of an agreement constitutes a literal breach of contract." *Saini*, 434 F.Supp.2d 923. This principal applies in the case of a guaranty. See *Cal. First Bank v. Braden*, 216 Cal.App.3d 672, 677. "For a guaranty, the breach occurs when the note falls due and remains unpaid." *Id.* For example, in *Medical Providers Financial Corp. II v. New Life Centers, L.L.C.*, 818 F.Supp.2d 1271, the court granted a motion for summary judgment on breach of written guaranty simply because the obligors failed to pay by the time the guaranty came due. *Id.* at 1275.

Defendant failed to make a single payment on the Sylver Guaranty as modified in 2008 or 2010. He further failed to make payments pursuant to the Sylver Agreement. Thus, the Defendant

1 breached the terms of the the Sylver Guaranty as modified in the 20008 Modification and the 2010  
2 Modification as well as the Sylver Agreement.

3           **C.     Plaintiff was Harmed by the Breach because it is Owed \$1,531,823.00 plus**  
4           **Interest, Costs and Fees.**

5           A balance of \$1,531,823.00, plus interest, costs, and fees remains outstanding on the Sylver  
6 Guaranty. Plaintiff has received *no* payment on the Sylver Guaranty (as modified pursuant to the  
7 Sylver Agreement). Mr. Sylver had an opportunity to discharge his sizable guaranty obligation  
8 pursuant to the Sylver Agreement modifying the guaranty, but made no payment of any  
9 kind. Therefore, he is now obligated to pay Plaintiff the amount due on the guaranty, \$1,531,823.00  
10 plus interest, fees and costs.

11 ///

12 ///

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

V. **CONCLUSION**

Defendant signed a valid guaranty and failed to honor his obligation pursuant to the plain terms of the guaranty. Plaintiff has lost \$1,531,823.00 and is entitled to repayment for this loss. Accordingly, Plaintiff respectfully requests that the Court grant its Motion for Summary Judgment and order Defendant to pay Plaintiff the amount rightfully owed, \$1,531,823.00.<sup>1</sup>

Respectfully Submitted,

DATED: December 29, 2016.

**MICHELMAN & ROBINSON, LLP**

By: /s/ Edward D. Vaisbort

EDWARD D. VAISBORT  
Attorney for Plaintiff,  
DCR MORTGAGE 1, LLC

DATED: December 29, 2016.

**DICKINSON WRIGHT, LLP**

By: /s/ John P. Desmond

JOHN P. DESMOND  
Attorney for Plaintiff,  
DCR MORTGAGE 1, LLC

<sup>1</sup> Attached hereto as Exhibit 3 for the Court's consideration is a [Proposed] Order Granting Plaintiff's Motion for Summary Judgment.

**CERTIFICATE OF SERVICE**

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to Fed. R. Civ. P. 5(b); I am serving a true and correct copy of the attached **PLAINTIFF DCR MORTGAGE I, LLC'S MOTION FOR SUMMARY JUDGMENT** on the party listed below through the **United States District Court's CM/ECF filing system:**

Thomas R. Port, Esq.  
2020 Pama Lane  
Las Vegas, NV 89119

DATED this 29th day of December, 2016.

/s/ Cindy S. Grinstead

An employee of DICKINSON WRIGHT PLLC

**TABLE OF EXHIBITS**

<b>Exhibit</b>	<b>Description</b>	<b>Page(s)<sup>1</sup></b>
1	Declaration of Jordan Zavislak	103
2	Declaration of Celina C. Kirchner	108
3	[Proposed] Order Granting Plaintiff's Motion for Summary Judgment	2

---

<sup>1</sup> Exhibit page counts are exclusive of exhibit slip sheets.